Editor's note: Reconsideration dismissed as moot; decision affirmed -- 130 IBLA 314 (September 8, 1994)

UNITED STATES v. MINECO
UNITED STATES v. CYRUS L. & MARY F. COLBURN
UNITED STATES v. CACHE PROPERTIES

IBLA 90-108 Decided September 7, 1993

Appeal from a decision by Administrative Law Judge Ramon M. Child finding no discovery of valuable mineral on the Fraction and Fraction No. 1 placer mining claims, Josie and Josie No. 1 lode mining claims, and the Nugget placer claim. CO Contest Nos. 741 and 742; CMC 134872-CMC 134876; mineral patent applications CO 42024 and CO 42015.

Affirmed.

1. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

   Under the prudent man test, a discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a paying mine.

2. Mining Claims: Contests--Mining Claims: Determination of Validity

   Where the United States contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance.

3. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Lode Claims

   A placer discovery (assuming it exists), will not support a lode location. Exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for

inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit on the lode claims will not overcome a prima facie case that there is no discovery.

4. Administrative Procedure: Hearings--Mining Claims: Contests--Mining Claims: Hearings--Rules of Practice: Evidence--Rules of Practice: Hearings

A continuance of a hearing into the validity of a mining claim will only be granted where the mining claimant presents sufficient reason to justify the grant of an additional opportunity to present his case, i.e., where circumstances have placed a substantial constraint upon his ability to obtain or offer samples or other evidence of a discovery.

5. Mining Claims: Contests--Mining Claims: Determination of Validity

As against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. As the title owner, the United States may regulate mining activities in national forests in order to protect surface resources. Therefore, the motivation of the managing Government agency in initiating a contest against a mining claimant is irrelevant.

APPEARANCES: Cyrus L. Colburn, Jr., Denver, Colorado, pro se and for Mary Francis Colburn, Mineco, Inc. and Cache Properties, Inc.; Daniel R. Rosenbluth, Esq., Office of General Counsel, U.S. Forest Service, Denver, Colorado, for the United States.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Cyrus L. Colburn, Jr., Mary Francis Colburn, Mineco, Inc., and Cache Properties, Inc., have appealed from a decision dated October 31, 1989, by Administrative Law Judge Ramon M. Child declaring five mining claims held by appellants, the Fraction and Fraction No. 1 placer claims, the Josie and Josie No. 1 lode claims, and the Nugget placer claim, invalid for lack of a discovery of a valuable mineral deposit on the claims.

Appellants' claims are located within the Arapaho National Forest, approximately one-half mile northwest of the town of Breckenridge, Colorado, in Summit County. The Nugget placer claim is located within secs. 35 and

36, T. 6 S., R. 78 W., sixth principal meridian; the Fraction and Fraction No. 1 placer mining claims, and the Josie and Josie No. 1 lode claims are located within sec. 36, T. 6 S., R. 78 W., sixth principal meridian. 1/

In July 1984, the U.S. Forest Service (FS), U.S. Department of Agriculture, received a proposal on behalf of Lincoln West Inc., a land development corporation to exchange certain non-Federal lands lying in the Arapaho National Forest. The Fraction and Fraction No. 1 placer claims and the Josie and Josie No. 1 lode claims held by appellants are situated on Federal lands sought in the exchange proposal. On November 18, 1985, the lands involved in the land exchange proposal were segregated for 2 years pending the land exchange action (Exh. G-6 at 30).

FS prepared an Environmental Assessment to document the consequences of the exchange proposal. In a Decision Notice and Finding of No Significant Impact dated March 27, 1987, FS approved the proposed exchange, subject to, inter alia, a determination that no valid discovery of valuable mineral exists on appellants' claims (Exh. C-33, Schedule F). On June 3, 1987, BLM entered into the Exchange Agreement subject to a finding of no valid discovery (Exh. C-33).

In August 1984, Colburn filed an operating plan with FS pursuant to 36 CFR 228 Subpart A. 2/ The operating plan included the request to allow mining and construction of a mill building on the claims (Exh. G-6 at 30; Exh. C-18). The proposed activity covered by the plan was to span 6 years (Exh. C-18 at 11).

By notice dated November 8, 1984, the District Ranger, FS informed appellants that a mineral examination prepared on the Fraction No. 1 placer in February 1976 indicated that the validity of the claims was in question; therefore, the operating plan would not be approved until validity of the claims could be established, and that scheduling of a mineral examination

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1/ Departmental proceedings involving the Nugget placer claim, (Bureau of Land Management (BLM) serial No. CMC 134876, Mineral Survey No. 20873), are docketed as CO contest No. 742 and included in mineral patent application No. 42015, filed by Cyrus L. and Mary Francis Colburn, and Cache Properties, Inc. Proceedings involving the Fraction and Fraction No. 1 placers, and the Josie and Josie No. 1 lode claims (CMC 134872-CMC 134875, Mineral Survey No. 20872) are docketed as CO contest No. 741, and included in mineral patent application No. 42024, filed by Cyrus L. and Mary Francis Colburn, and Mineco, Inc. CMC 134872-CMC 134875 are also included in a proposal for land exchange between BLM and Lincoln West, Inc., which bears the serial number Colorado 40305.

2/ These regulations set forth "rules and procedures through which use of the surface of the National Forest System lands in connection with operations under the United States mining laws * * * shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources."

would soon follow (Exh. C-21). 3/ Appellants were notified on November 13, 1984, that a mineral examination was scheduled to start on July 22, 1985 (Exh. G-6 at 30).

Three days prior to the scheduled examination, on July 19, 1985, appellants filed two Mineral Patent Applications (MPAs) with the Colorado State Office, BLM. MPA CO 42024 requests a patent for the four claims subject to the proposed land exchange; MPA CO 42015 requests patent for the Nugget placer claim (see note 1) (Exh. G-6 at 30, 140).

The Fraction, Fraction No. 1, and Nugget placer claims were examined from July 22 through August 2, 1985. The Josie and Josie No. 1 lode claims were examined on June 3 and July 9, 10, and 18, 1986 (Exh. G-6 at 30, 140).

On February 23, 1988, FS supervising geologist Frederick B. Mullin released two mineral reports prepared as a result of the 1985 and 1986 mineral examinations (Exh. G-6 at 47, 149). Mullin recommended that contest proceedings be initiated.

On November 9, 1988, BLM, acting on behalf of FS, issued two contest complaints charging that the subject claims were invalid for lack of discovery of a valuable mineral deposit. Appellants denied the charges and an evidentiary hearing was held before Judge Child in Denver, Colorado, May 30 through June 2 and July 26, 1989.

At the hearing, two FS mineral examiners, geologists Frederick B. Mullin and John S. Dersch, testified for the Government. Cyrus Colburn, Jr. and Gregory E. Thurow, an exploration geologist, testified on behalf of contestees.

Appellants' case is based upon the premise that valuable mineralization exists in the claims in such fine form that it is known as "flour gold." Appellants claim that flour gold exists on both the lode and placer claims, and that their unique processing equipment captures both flour and placer deposits. Appellants claim that the Government's sampling methodology did not capture this fine flour gold, and that FS' denial of Colburn's plan of operations, which would have permitted him to place newly designed equipment on the claims to capture the flour gold, was injurious to his case (Tr. 602).

Judge Child characterized Mullin's testimony concerning the existence of flour gold on the claims as follows:

> Mr. Mullin denied that he believed "flour gold" to be present on these claims. (Tr. 223-225) He relied on the position reflected in an article entitled Gold Placers of Colorado appearing in the quarterly publication of the Colorado School of Mines,

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3/ On Aug. 25, 1985, the Regional Forester upheld the Forest Supervisor's decision not to approve the plan of operations pending a final determination of the validity of the claims (Exh. G-6 at 228).

Volume 69, No. 3, published in 1974, and particularly to a section of the article entitled Placers of the Breckenridge Area. (Tr. 79, 80) The article there states "* * * there is little information available concerning the gold produced in the district. According to most reports, the gold of all the placers was shot gold, massive and course with some nuggets and very little flour gold." (Tr. 82) Nonetheless, on cross-examination, Mr. Mullin acknowledged that he co-authored the Mineral Examiners Handbook, a BLM Manual released January 3, 1985, wherein it states:

> Special care must be taken in the concentrating procedures to ensure retention of all gold values. In many placer deposits the bulk of the gold values are com-posed of finely divided materials such as flour gold which are extremely difficult to capture. Fine gold values can run between ten percent and a hundred percent of the total recoverable values of the deposit.

(Tr. 219, 220, 225).

On further cross-examination, Mr. Mullin agreed that if one were to try to extract the flour gold they would require a process capable of doing it. He further acknowledged that although a sluice box with carpeting on the bottom of it was utilized in reducing the samples at the claim sites in the course of his mineral examination, which recovered "some very fine gold," it was possible that some flour gold was flushed away. (Tr. 220, 221, 226, 227).

(Decision at 9-10).

Judge Child's decision set forth appellant's burden of proof, and the pertinent evidence relating to whether appellant met that burden, as follows:

> The basic factual issue the contestees were required to prove was that this "flour gold" existed on each of the claims and in such quantity that a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of developing a profitable mining operation.
>
> Despite 26 years of ownership of these unpatented claims and every consideration being extended to the contestees by the judge who repeatedly reminded contestees of this basic factual burden, and continued the hearing to permit such testimony, no probative evidence was offered by contestees that there was in fact gold on the claims in the form of "flour gold" or if there were such, in what quantity. (Tr. 680-683, 719, 720, 772, 773, 979-980).

> Cyrus Colburn testified that samples from these placer claims taken to the Colorado School of Mines Research Institute, a private organization, and run through "our equipment" showed substantial amounts of flour gold; he was told even as much as 1.74 ounces per ton. The tangible data of said testing, he said, was in the possession of his brother, Dr. William Colburn, who resides in Denver, Colorado. (Tr. 627, 628, 629, 630, 639, 778) Mr. Colburn testified that he was relying on testimony from his brother, Dr. William Colburn, to provide the necessary testimony and data in support thereof, but Dr. Colburn was not able to attend the hearing by reason of a recent injury. (Tr. 629, 640-642, 719).
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> Mr. Cyrus Colburn acknowledged that whereas the Forest Service had prevented him from conducting mining operations on the claims, it had not prevented him from proving a discovery. (Tr. 716)
>
> Contestees were granted a continuance in order to avail themselves of the testimony of Dr. Colburn. (Tr. 719, 779) In the final analysis, however, Dr. Colburn was not produced, and contestees failed to meet their burden of proving a valid discovery on any of the claims.

(Decision at 10-11).

In its "Brief in Support of Appeal," (SOR) 4/ appellant argues that (1) by denying approval of its plan of operations, "[t]he Government prevented appellants from proving discovery at the time of the mineral examination"; (2) "the mineral examination performed by the FS was insufficient to accurately evaluate appellants' discovery of valuable minerals"; (3) "[t]he Court erred in denying appellants' request for a continuance" in order to secure Dr. William Colburn's expert testimony; and (4) the Administrative Law Judge's decision "did not address appellants' claim of an abridgement of their 'valid existing rights.'"

In a supplement to its SOR, appellant requests that the Government be required to provide an accounting of its costs incurred in pursuit of this contest. Appellants argue that the "conduct of the government and resulting inequities of that conduct," presumably including these costs, are relevant to "appellants' claim of abridgement of their valid existing rights" incurred by the Government (Appellant Supplementation to Issue Number 4 of Appeal at 2).

4/ 43 CFR 4.412 designates the pleading to be filed stating the reasons for appeal as a "Statement of Reasons." Appellant filed both a Brief in Support of Appeal and a Statement of Reasons (SOR), received by the Board as one document on Jan. 3, 1990. We will, therefore, refer collectively to these two documents as a SOR.

In its answer, FS responds by stating that the evidence repudiates appellants claim that the Government prevented it from making a discovery; that the Judge's analysis is correct that the mineral examination was not flawed; that the record reveals that appellant's motion for continuance of the hearing was properly denied, and that the decision squarely addresses appellants' claims that it has valid existing rights, albeit not in terms appellant would prefer.

[1] The validity of any mining claim is dependent upon the disclosure of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 22 (1988). A valuable mineral deposit exists if the mineral found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. United States v. Coleman, 390 U.S. 599, 602 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This "prudent man" test has been refined to require a showing that "as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." United States v. Holder, 100 IBLA 146 (1987); In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). However, actual successful exploitation need not be shown--only the reasonable potential for it. Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971). The question is not whether a profitable mining operation can be demonstrated, but whether, under the circumstances and based upon the mineralization exposed, a person of ordinary prudence would expend substantial sums with the reasonable expectation that a profitable mine might be developed. Barton v. Morton, 498 F.2d 288 (9th Cir.), cert. denied, 419 U.S. 1021 (1974).

[2] When the United States contests a mining claim on the basis of a lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint. When as in the case before us, the Government examiner, who has had sufficient training and experience to qualify as an expert witness, testifies he has physically examined a claim and found mineral values insufficient to indicate the discovery of a valuable mineral deposit, the United States has established a prima facie case that the claim is not supported by a discovery. United States v. Franklin, 99 IBLA 120, 125 (1987); United States v. Ledford, 49 IBLA 353 (1980). Once a prima facie case is presented, the burden then shifts to the claimant and it is encumbent upon the claimant to present evidence which preponderates sufficiently to overcome the Government's case on the issues raised. United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); United States v. Franklin, supra.

In the instant case, the Government mineral examiners took 40 samples from the placer claims, vertical from in-place topsoil to bedrock, at locations chosen by appellants' consultant. Reasonable care was taken during manual processing to retain fine particles. Three types of assays were performed to determine the mineral content within these samples, including a fire assay of tailings to determine whether gold not recoverable by normal gravity separation methods was present. Having obtained mineral values

within the claims and calculated the quantity of material within the claims, Mullin estimated that the value of all gold in the claim would be exceeded by set-up and labor costs. We hold that this evidence of a lack of discovery on the placer claims established the Government's prima facie case.

In their SOR, appellants argue that FS prevented it from proving a discovery on its claims at the time of the mineral examination by denying approval of its mining plan of operations, which proposed the use of production equipment specifically designed to extract flour gold. Appellants have not convinced us, however, that the only method of calculating the amount of total gold on these claims is by permitting development of the claims. Indeed, as early as 1969, appellants' consultants were capable of performing analyses registering the amount of total gold contained in drill samples. See Earth Sciences Report, Exh. G-6 at 81; Exh. C-16.

Appellants did not produce evidence to refute the conclusion drawn by Mullin that flour gold, if present at all of the claims, was not of such quantity and quality as to render the deposit valuable. Without a credible mineral analysis indicating otherwise, we must conclude that total gold values on the claims, including gold not recoverable by placer methods, are not such that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with reasonable likelihood of success in developing a profitable mine.

[3] According to Mullin's mineral report, Colburn could not show a mineral exposure on the lode claims during the 1985 examination (Exh. G-6 at 38). The examiners returned to the Josie claims in 1986 and took four samples from two backhoe pits on the lode claims. Id. The samples were assayed in the same manner as those taken from the placer claims. Assay results for these samples showed minimal presence of gold or other mineral; therefore, no weighted values were computed.

At the hearing, appellants did not produce evidence of an exposure on the Josie claims, other than to claim that the lode claims, like the placers, contain "flour gold," which is too fine for removal by established methods. However, a placer discovery (even assuming it exists), will not support a lode location. United States v. White, 118 IBLA at 315, 98 I.D. at 155. While appellant's witness, Thurow, testified that he would drill beneath the old mineral workings--that is, on the downward extensions of the mined out areas at the surface of the lode claims--Colburn did not commission him to perform such drilling (Tr. 622-23).

Exposure of a vein or lode carrying mineral values in place is a necessary precondition to the validity of a lode claim. United States v. American Independence Mines & Minerals, 122 IBLA 177, 182 (1992); United States v. Feezor, 74 IBLA 56, 74, 90 I.D. 262, 272 (1983), citing United States v. Henault Mining Co., 73 I.D. 184 (1966), aff'd, 419 F.2d 766 (9th Cir. 1969). In order to prove a valid discovery on a lode claim, the claimant must establish the existence of a vein or lode of mineral in place, that the vein carries a valuable mineral deposit, and that these two elements when taken together, must be such as to warrant a prudent man in the

expenditure of his time and money in the effort to develop a valuable mine. United States v. Feezor, supra at 73-74; 90 I.D. 272 n.5, quoting Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912).

When a mineral examiner undertakes a systematic reconnaissance of a group of claims, and makes a conscientious effort to sample those sites deemed most likely to contain mineralization, the combination of observation and sample results is sufficient to form a proper basis for a professional opinion. United States v. Mavros, 122 IBLA 297 (1992). Furthermore, Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. United States v. Franklin, supra at 125. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case
an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit on the lode claims will not overcome
a prima facie case that there is no discovery. Id.

[4] In the SOR, appellants charge that they had only 72 days' notice of the hearing, and that Judge Child's denial of a continuance deprived them of the opportunity to adequately prepare their case and to ensure the presence of key witnesses.

Appellants cite United States v. Gassaway, 43 IBLA 382 (1979), and United States v. Foresyth, 15 IBLA 43 (1974), in support of their contention that Judge Child should have granted a continuance under the circumstances, and that his denial of such prejudiced their ability to prove a valid discovery. In Gassaway, the Board stated:

> It is required that a mining claimant make a discovery of a valuable mineral deposit prior to the location of his claim. 30 U.S.C. § 23 (1976). * * * Thus, it is presumed that when the validity of his claim is challenged in a contest proceeding the mining claimant need only come forward with the evidence of the discovery which he has already uncovered. Therefore, where a mining claimant requests a further hearing or the continuance of a hearing of which he has had adequate notice he must posit such "exculpatory factors" as will justify the grant of an additional opportunity to present his case. * * * United States v. Foresyth, 15 IBLA 43 (1974). Furthermore, it must appear that the mining claimant is not using the additional time to make the requisite discovery. [Emphasis in original.]

Id. at 384. Appellants allege that the "exculpatory factors" justifying the continuance in this instance were FS' refusal to permit claimants' equipment on the claims; FS' refusal to approve claimants' mining plan of operations, and Judge Child's refusal to continue proceedings until appellants' witnesses including Colburn's brother, William Colburn, who was recuperating from a hand injury and also from a stroke he subsequently suffered, could appear.

In United States v. Foresyth, supra, this Board remanded a mining claim contest for further hearing where, subsequent to notation of an application for withdrawal of the lands from mining activity, FS obtained a restraining order enjoining contestees from entering upon their claims and removing chemical grade limestone for the purpose of testing the marketability of the deposit. In that case, the Board held: "[N]otation of the application for withdrawal did not foreclose the right of the claimants to take samples or other evidence to prove the existence of a discovery on each claim * * *. This right of the claimants was effectively negated by the Government's attorneys when they obtained a restraining order." Id. at 61. Appellants contend that FS' denial of their plan of operations, including the placement and operation of their production equipment on the claims, is similar in effect to the circumstances in Foresyth. We disagree. The record contains no evidence that appellants were foreclosed from taking samples or undertaking exploratory activity on their claims; appellants were, however, prohibited from conducting mining activity on national forest lands unless and until they demonstrated existence of a discovery, a regulatory activity well within the authority of FS. See United States v. Goldfield Deep Mines Co. of Nevada, 644 F.2d 1307 (9th Cir. 1981).

Nothing in the record supports the allegations that Judge Child improperly denied appellants' request for continuance of the hearing for purposes of securing witnesses.

The transcript of the hearing reveals that Judge Child extended every opportunity to appellants to produce Colburn's brother, including a 2-month continuance (Tr. 680-83, 719-20, 734-746, 772-73, 779). After review of the record in its entirety, we are in agreement with Judge Child's assessment of appellants' failure to establish evidence on their own behalf, quoted supra.

Appellants have made no offer of proof which would indicate a different outcome than that described in Judge Child's decision. In United States v. Murdock, 65 IBLA 239, 243 (1982), this Board stated:

> [T]o warrant a further hearing in mining claim contests based on an asserted lack of a discovery, an appellant must make an evidentiary offer of proof of discovery. Vague and unsupported assertions of mineralization do not establish a basis for reopening a contest hearing. United States v. Speckert, 55 IBLA 340 (1981).

Such are the circumstances which are presently before us; we therefore reject appellants' assertions that Judge Child's denial of their May 28, 1989, request for continuance prevented them from proving a discovery,
and we decline to reopen the matter for further hearing.

[5] Appellants claim they have been divested of their "valid existing rights." In their "Appellant Supplementation to Issue Number 4 of Appeal," at page 3, submitted to the Board on February 5, 1990, appellants have requested that the Board scrutinize the motivation of the Government in contesting these claims, and to hold that appellants hold "the best title to this land after the Government."

As against the United States, however, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may be perfected in all other respects, unless and until a claimant is able to
show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. United States v. Multiple Use, Inc., 120 IBLA 63, 79 (1991). Until patent has issued, the rights of the mining claimant are limited by the statutes and regulations under which those rights are acquired and maintained. The title to the lands subject to unpatented mining claims remains in the United States. See Cameron v. United States, 252 U.S. 450, 460 (1920).

Appellant requests the Board to place a relative value upon the motivation behind the Government's contest. The law is well settled, however, that, as the title owner, the United States may regulate mining activities on Federal lands to protect the surface resources. See United States v. Grimaud, 220 U.S. 506 (1911). Recognizing this authority, this Board acknowledges that the motivation of any Government agency in initiating a contest against a mining claim is irrelevant. United States v. Multiple Use, supra at 125; United States v. Franklin, supra at 126; United States v. Rice, 73 IBLA 128 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

John H. Kelly
Administrative Judge